

IN THE COURT OF COMMON PLEAS IN THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STATE OF DELAWARE

v.

JOSEPH D. HUNTER

Defendant.

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Case No.: 0511020461
Cr.A. No.: K05-12-0713

Submitted: April 21, 2006
Decided: June 9, 2006

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DECISION ON MOTION TO SUPPRESS

Joseph D. Hunter (“Defendant”) was arrested on or about November 23, 2005, for driving under the influence¹. He has now filed a motion with this court to suppress his intoxilyzer results from evidence at trial. The Defendant contends that this evidence should be suppressed because his seizure for driving under the influence was not reasonable under the Fourth Amendment to the United States Constitution since the State

¹ The Defendant was also charged with driving the wrong way on a one-way road in violation of Title 21, Section 4121(a) of the *Delaware Code* and Driving While License is Suspended or Revoked in violation of Title 21, Section 2756(a) of the *Delaware Code*.

did not have probable cause to believe that he was driving under the influence². For the reasons that follow, the Defendant's motion is granted.

FACTS

In the early morning hours of November 23, 2005, Corporal Brower ("Brower") of the Delaware State Police was traveling southbound on United States Route 13 ("U.S. 13") when he noticed the vehicle the Defendant was driving traveling toward him northbound on a southbound lane. The Defendant swerved, went onto the shoulder of southbound U.S. 13 and stopped his car. Brower stopped his car to investigate. As he approached the Defendant, he detected a strong odor of alcohol. The Defendant's speech was slow and slurred and he had bloodshot eyes. He asked the Defendant if he had been drinking. The Defendant stated that he had had a shot of whiskey and two beers that night. Additionally, Brower noticed that the Defendant had an empty whiskey bottle and a half full can of Coors beer in his car. Brower wanted to have the Defendant perform sobriety field tests. However, the weather was cold and windy. Therefore, he had the Defendant transported to Delaware State Police Troop 3 ("Troop 3") to have sobriety field tests performed there.

At Troop 3, the Defendant was turned over to Corporal Smith-Camacho for her to further investigate whether the Defendant was driving under the influence. She was advised of Brower's findings at the scene of the stop. She could smell alcohol on the Defendant. She also noticed that he had a flushed face and bloodshot eyes. Given this information, she decided to have the Defendant perform field sobriety tests.

² The Fourth Amendment to the United State Constitution is a fundamental right made obligatory on the States by the Fourteenth Amendment to the United States Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961).

The Defendant performed exceptionally well on the field tests. He passed the alphabet test, the number test and the finger dexterity test (with his right hand) without any problem. He passed the walk and turn test and the one-leg stand test. He was asked to do the finger to nose test and did well with his left hand, but, he missed the tip of his nose with his right hand. At all times, the Defendant was cooperative and polite. Given all the information at her disposal, Corporal Smith-Camacho decided to arrest the Defendant for driving under the influence and have him take the intoxilyzer test.

DECISION

The issue before the Court is whether the State had probable cause to arrest the Defendant for driving under the influence and have him take the intoxilyzer test³. In *Maxwell v. State*, 624 A.2d 926, 930 (Del. 1993), the Delaware Supreme Court held that “[a] finding of probable cause does not require the police to uncover information sufficient to prove a suspect’s guilt beyond a reasonable doubt or even to prove the guilt is more likely than not. To establish probable cause, the police are only required to present facts which suggest, when those facts are viewed under the totality of circumstances, that there is a fair probability that the defendant has committed a crime” (citations omitted). In essence, a probable cause determination is a fact specific inquiry taking into account all of the police officer’s observations after initial contact with the defendant. *Perrera v. State*, 2004 Del. Lexis 255 (Del. June 25, 2004). “Probable cause exists where the facts and circumstances within the police officer’s knowledge, and of

³ Under 21 *Del. C.* §2740(a), any person operating a motor vehicle in Delaware is deemed to have given consent to chemical testing to determine the presence of alcohol or drugs, but, pursuant to §2740(b) of Title 21, this testing may only be required when a law enforcement officer has probable cause to believe the person was driving under the influence of alcohol or drugs.

which the police officer had reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution to believe that an offense has been or is being committed.” *Bease v. State*, 884 A.2d 495, 498 (Del. 2005) (citation omitted).

In this case, at the time that Corporal Smith-Camacho arrested the Defendant for driving under the influence and administered the intoxilyzer test on him, an objective weighing of the totality of the circumstances indicates that the State lacked probable cause for the arrest and testing. While it is true that Corporal Brower observed the Defendant driving north on a southbound lane of U.S. 13, and that the Defendant smelled of alcohol, had glassy eyes, admitted that he had “two beers and a shot”, and had an empty whiskey bottle and one-half can of beer in the car, the Defendant performed exceedingly well during his field sobriety tests back at the station.

The Defendant passed the alphabet test, the counting test and the finger dexterity test without any problem. He passed the walk-and-turn test and even the one-leg stand test. It was only during the second part of the finger-to-nose test that the Defendant failed to completely touch the tip of his nose. After making the Defendant undergo this challenge, even the State admits that he successfully passed five and a half of the six tests administered. Given the Defendant’s performance on these field tests, it is difficult to find that there was a fair probability that the Defendant was driving under the influence.

In its argument, the State cites language in *Perrera* which states that “[m]ixed results in field sobriety tests do not extinguish probable cause if other sufficient factors are present”. *Perrera* at *4. But, a close look at that case in comparison to this one is instructive. In *Perrera*, the results of the field sobriety tests administered were mixed. The defendant in that case passed the finger-to-nose and one-leg stand tests, but he failed

the alphabet and counting tests, the horizontal gaze nystagnus test and two separately administered portable breathalyzer tests. Here, the Defendant passed five and a half of six field sobriety tests administered to find probable cause to support his arrest for driving under the influence. Additionally, he only failed the sixth test “by a nose”. Although the Defendant’s appearance, admission of drinking and his driving behavior were incriminating, the State, and the Court, cannot ignore the overwhelming exculpatory evidence presented during his field tests. A fair consideration of all of the observations by the investigating officers in this case leads to the conclusion that the State lacked probable cause to arrest the Defendant for driving under the influence and to administer the intoxilyzer test on him after his exceptional performance on the field sobriety tests. Therefore, the Defendant’s motion to suppress his intoxilyzer results from evidence at his trial for driving under the influence is granted.

CONCLUSION

The State lacked probable cause to arrest the Defendant for driving under the influence and to administer the intoxilyzer test on him. Therefore, the Defendant’s motion to suppress his intoxilyzer results from evidence at his trial for driving under the influence is **GRANTED**.

IT IS SO ORDERED THIS 9TH DAY OF JUNE, 2006.

CHARLES W. WELCH